



Mitigating Damages

Condemning replacement or substitute property

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A public agency's acquisition of private property can sometimes trigger significant severance damages due to eliminating access, cutting off utility service or taking a substantial portion of a property's parking. Severance damages often arise in "partial takings" where a public agency is taking a portion of an owner's property, leaving the owner with a "remainder" parcel that may suffer a diminution in value as a result of the remainder's being "severed" from the part taken. As agencies look to get more creative in minimizing exposure to large damages claims, they will sometimes offer up mitigation alternatives, such as providing an alternative access, or new utility service, or replacement parking, with such rights being granted from an adjacent or neighboring property. These mitigation solutions, generally referred to as *substitute condemnation*, are often a win-win for property owners and public agencies, as a landowner is made whole, and an agency avoids a large damages claim. But can the government force another nearby property owner to give up their property rights for such mitigation solutions? There are a few situations, outlined below and authorized by eminent domain law, where additional land can be acquired or substituted.

Acquisition of Substitute Property

Code of Civil Procedure section 1240.320 allows for substitute property to be acquired and then exchanged for necessary property, but it is limited to instances where the necessary property is held for a public use and the owner of the necessary property possesses the power of eminent domain. Generally, a public agency is able to acquire substitute property pursuant to Code of Civil Procedure section 1240.320 so long as the following three conditions are met:

1. The owner of the necessary property has agreed in writing to the exchange;
2. The necessary property is devoted to or held for some public use and the substitute property will be devoted to or held for the same public use by the owner of the necessary property; and
3. The owner of the necessary property is authorized to exercise the power of eminent domain to acquire the substitute property for such use.

Given the conditions identified above, the authority granted to condemning agencies pursuant to Code of Civil Procedure section 1240.320 is narrow in its reach and limited to where the person with whom the property is to be exchanged has agreed in writing to the exchange and could himself have condemned the property to be exchanged.

Acquisition of Property Necessary to Provide Utility Service or Access to Public Road

Code of Civil Procedure section 1240.350 provides that when a condemning entity acquires land and that acquisition ultimately cuts off utility service or access to a public road to other private property, in those circumstances, the condemning entity may acquire additional property by eminent domain in order to provide replacement utility service or road access. However, in utilizing this statute, the agency must also analyze any hardship impacts created to the owner of additional property. That said, although the agreement of the owner of the landlocked parcel will generally be obtained, this is not a prerequisite. The legislative comments indicate the purpose of this statute is to restore cut-off property to useful life and to avoid claims of substantial severance damages. The condemnor is minimizing the damage to the property retained by the owner.

The ability to condemn substitute property pursuant to Code of Civil Procedure section 1240.350 is purely discretionary. If a condemning agency chooses not to avail itself of this authority, a property owner cannot force such a physical solution and is limited to money damages.

Further, the original condemnation action that would cut off utility services or public road access does not need to be completed in order to condemn substitute land under this statute. For example, in *County of Fresno v. Shelton* (1998) 66 Cal. App. 4th 996, the appellate Court found that, based on statutory interpretation and public interest, a public entity has standing to bring a Code Civil Procedure section 1240.350 condemnation action to acquire a substitute access easement for the unacquired remainder of property prior

to its obtaining title to the rest of the parcel when the original condemnation action was mooted by a settlement. The Court found that the County was in the process of “acquiring” an interest in property that would leave the unacquired portion landlocked and thus maintained the power of condemnation pursuant to Code Civil Procedure section 1240.350.

Additional Property for Protection of Project

Additional land may also be acquired pursuant to Code of Civil Procedure section 1240.120. This section allows for property to be acquired if it is “necessary to carry out and make effective the principal purpose involved including but not limited to be used for the protection or preservation of the attractiveness, safety and usefulness of the project.” Property acquired pursuant to this statute can later be disposed of, so long as there are reservations or restrictions that are necessary to protect or preserve the attractiveness, safety, and usefulness of the project. There needs to be a connection between the acquisition of the additional property and the project (i.e., the additional acquisition needs to support the project). Public agencies could potentially get creative and use this statute to acquire property needed for construction of the project, including safety or attractiveness features, and then use excess portions to mitigate damages.

Closing Thoughts

One important practice pointer when utilizing these statutes is that, in most cases, the resolution of necessity and the complaint filed pursuant to such resolution must specifically refer to the appropriate substitute condemnation civil code section and shall include a statement that the property is necessary for the purpose specified in that section. The determination in the resolution that the taking of the substitute property is necessary has the effect as other resolutions of necessity.

These statutes do not get utilized too often, but they can be helpful in certain situations where an access elimination or utility removal could create huge damages claims if not properly replaced. Public agencies should remember these options exist when designing their projects, and property owners who may be significantly impacted should consider these alternatives to keep their properties useful and viable. 🌟



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